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IN THE

Supreme Court of the United States

October Term, 1969

FILED
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JOHN F. DAVIS, CLERK

No. 71

SAMUEL J. ABATE, as a Taxpayer of the County of Rockland, and as a Representative of Others Similarly Situated,

and

JUNE MOLOF, MINDY BAKER, GLORIA ENGLISH, JOYCE BRAZILLER, LINDA BERNS and JUDY BARTOSIK, as Individuals and as Representatives of Others Similarly Situated,

and

CORNELIUS T. O'SULLIVAN, ICHABOD F. SCOTT and MICHAEL J. CLARKE,

Petitioners,

against

PAUL F. MUNDT, PHILIP J. ROTELLA, JOHN B. LOVETT, JOHN F. MC ALEVEY, HAROLD K. GRUNE, constituting the Board of Supervisors of the County of Rockland, THE COUNTY OF ROCKLAND, and CHARLES FURST and MARION DORSEY, as Commissioners of the Board of Elections of the County of Rockland, and THE BOARD OF ELECTIONS OF ROCKLAND COUNTY,

Respondents.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The opinion of the Supreme Court of the State of New York, dated July 21, 1969 and modified on July 30, 1969, is not reported. (App. at pages 12 and 28 of the Petition.)

The opinion and dissent of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department, dated August 26, 1969, is reported at 33 A.D. 2d 660. (App. at page 30 of the Petition.)

The opinion and dissent of the Court of Appeals of the State of New York, dated October 8, 1969, is reported at 25 NY 2d 309. (App. at page 40 of the Petition.)

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

The only question presented is whether the plan of reapportionment implemented by a judgment of the Supreme Court of New York which provides for the election of legislators to the legislative body for the County of Rockland complies with the requirements of the Fourteenth Amendment of the United States Constitution.

Constitutional Provision Involved

The provision of the United States Constitution involved is Section One of the Fourteenth Amendment and is set forth in full in the Petition at page 5.

Statement of the Case

The County of Rockland in the State of New York is governed by a Board of Supervisors. The Board of Supervisors carries out the executive and legislative functions of County Government. The Board of Supervisors is composed of five supervisors, one being elected from each of the five towns within the County. The supervisor elected in each town serves as a member of the County Board of Supervisors by virtue of his election as the executive head of the governing body in the town. There are no cities in the County of Rockland. The population of each town within the County, as determined by a Federal Census in 1969, was as follows:

Stony Point	12,114
Haverstraw	23,676
Orangetown	52,080
Clarkstown	57,883
Ramapo	73,051
Total population	218,804

Upon the direction of the Supreme Court the County of Rockland adopted a plan of reapportionment that was approved by a judgment of that Court pursuant to an opinion dated July 21, 1969 and modified July 30, 1969. (App. at pages 12 and 28 of the Petition.) The plan of reapportionment provided that county legislators be elected from five districts within the County. The smallest district was allocated one legislator and the other legislators were allocated to each district in accordance with the population of that district. Thus, there was established one single-member district and four multi-member districts. In order to pre-

serve the integrity of the towns and to avoid fragmentation the district boundary lines and the town boundary lines were coterminous. A town supervisor elected within the town as the executive of the town government was also permitted to be elected to the County Legislature as a county legislator.

The plan of reapportionment provided for the election of eighteen legislators. The number of legislators to be allocated to each of the districts is determined by dividing the population of each, by the population of the smallest district. The number of legislators shall be the whole number resulting from that computation plus one for any major fraction.

For purposes of comparison as to representation between the districts a determination of the ideal representation can be computed by dividing the total population by the number of legislators, resulting in an ideal representation per legislator of 12,156. This figure of ideal representation can then be compared with the actual representation for each legislator to determine the extent of over or under representation as shown below.

District	*Population*	*Number of Legislators*	*Population per legislator*	*% of representation in relation to ideal representation*
Stony Point	12,114	1	12,114	0.3% over represented
Haverstraw	23,676	2	11,838	2.5% over represented
Orangetown	52,080	4	13,020	7.1% under represented
Clarkstown	57,883	5	11,577	4.8% over represented
Ramapo	73,051	6	12,175	0.2% under represented

The result of this computation shows that Orangetown is under represented by 7.1% and Clarkstown is over represented by 4.8%. This yields a maximum spread from the high to the low of 11.9%.

This plan of reapportionment was devised in good faith by the Board of Supervisors of Rockland County in an effort to comply with the rule of "one-man, one-vote" and at the same time to maintain the integrity of the towns which had been represented by the town supervisors sitting on the County Board for over a century.

The plan of reapportionment was implemented by a judgment of the Supreme Court and affirmed by the Appellate Division of the Supreme Court and the Court of Appeals.

The federal question sought to be reviewed herein was raised in the Supreme Court and discussed in the opinion of that Court (See App. at pages 12 and 28 of the Petition), and also in the Appellate Division of the Supreme Court and the Court of Appeals. In each stage of the proceedings, the parties raised the question of compliance with the Fourteenth Amendment of the United States Constitution.

ARGUMENT

I

The decision below is clearly correct.

The sole issue in this case is whether the population deviation for each county legislator is within permissible limits under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The highest Court in the State of New York held that based upon the facts in this case a spread between the smallest population per legislator and the largest population per legislator of 11.9% complied with the "as nearly as practicable" standard enunciated in *Reynolds* v. *Sims*, 377 U.S. 533.

The two recent decisions (*Kirkpatrick* v. *Preisler*, 394 U.S. 526 and *Wells* v. *Rockefeller*, 394 U.S. 542) struck down reapportionment plans which fell short of creating mathematical equality. However, this Court rejected any argument that there was a fixed numerical or percentage population variance established to satisfy without question the "as nearly as practicable" standard. The whole thrust of such a standard is inconsistent with the adoption of fixed permissible numerical population deviations. Population variances must be reviewed with regard to the circumstances of each particular case.

The Court of Appeals held that the population deviation in this case was justifiable for the purpose of maintaining the traditional and historical relationship between town and county government. Adherence to town lines and the allocation of legislators to each district in accordance with

population was a proper method of avoiding the fragmentation of towns which formerly had direct representation on the County Board of Supervisors. Thus, the Court of Appeals of New York has followed the standard relating to population variances laid down by this Court and applied it to the facts and circumstances surrounding the plan of reapportionment for Rockland County. The Court of Appeals has charted no new pathways in its approval of the plan of reapportionment for Rockland County. There are no new principles of law that have been established, but only the application of existing standards to particular facts and circumstances.

The Court of Appeals determined that the County of Rockland had made a good faith effort to achieve equality of representation and any variations in absolute equality were justified. Even the dissenting opinion in the Court of Appeals stated that the plan should not be rejected but should be approved as an interim measure since it achieved far greater equality than the existing Board of Supervisors form of government.

II

There is no conflict of decisions.

Petitioners assert that the decision of the Court of Appeals erroneously interprets the latest reapportionment decisions of this Court. Petitioners theorize that the Court of Appeals has drawn a distinction between permissible population variations on the Congressional, State and local level and, thus, this decision is in direct conflict with the decisions of the United States Supreme Court.

There is no such conflict and no amount of strained semantics can convert either the language of the Court of Appeals opinion or its actual application to the facts in this case into one warranting review by this Court. The Court of Appeals in reviewing the three levels of reapportionment—Congressional, State and local—has merely taken into account and weighed in the balance the different considerations and justifications at each level for variations from strict equality. In essence the Court has said that at the local level there may be a broader scope of permissible justifications for population deviation than at the Congressional level. The Court of Appeals clearly recognized the requirement for equality of population and described the plan in these terms. (App. at page 48 of the Petition.)

> "What the plan does is *not* to ignore population equality, but rather to achieve substantial equality within the context of a long-established town government framework, thus accommodating both constitutional and practical considerations * * * It represents a balanced bona fide application of the "one-man, one-vote" principle to the needs and circumstances of local government."

The dissent of Chief Judge Fuld in the Court of Appeals turned on the question of the permissible population variation. He is of the opinion that adherence to town boundaries is not a sufficient good faith justification for population deviation. However, the dissent does not discard the rationale for permitting justifiable population deviations since he cites with approval a population deviation of 14% which was upheld by the Court of Appeals involving Westchester County. (App. at page 67 of the Petition.) It is clear that both the majority opinion and the dissenting opinion would

not analyze population variations in a vacuum without any reference to proper justification for deviations.

The dissent by Chief Judge Fuld in essence is stimulated by a differing view of the factual justification in this case for the population deviation. The principle of law applied by the opinion of the majority and the dissent is the same but its application to the specific plan before the Court results in a divergence of views.

It is apparent that the Court of Appeals has followed the decisions of this Court and applied the standard of population equality to the facts and circumstances of this case. It is impossible to conjure up any conflict between the decision of the Court of Appeals and other decisions of this Court.

III

There is no important question of constitutional law.

Petitioners insist that hundreds of local legislative bodies in New York State alone will be affected by the Court of Appeals decision in this case and that millions of residents may lose their right to equal representation.

It is undoubtedly true that the rule of "one-man, one-vote" has had a significant impact on the method of representation at the local level and most of the counties in the State of New York in one manner or another have complied with the requirements for equal representation. However, it is difficult to perceive in what manner the application of the rule of equal representation in this case has to other local governments. There is no new important question

of law that must be settled by this Court. There is no significant or unique constitutional question lurking in the language of the Court of Appeals in this case. The petitioners set forth no citation of any pending litigation or even any indication of classes of hypothetical cases that would be affected by the Court of Appeals decision. The bald statement of the petitioners that millions of residents may lose their right to equal representation is not substantiated or explained.

The Court of Appeals in New York has been in the forefront in upholding the principle of "one-man, one-vote" and in fact applied the rule to local legislative bodies before this Court did so. The Court of Appeals has not established any new or important principle of law in this case. It has merely applied the principle of equal representation to the facts and circumstances of a particular county within the State. There is not the slightest taint of arbitrariness or discrimination in the reapportionment plan for Rockland County and there is a complete absence of any allegation of invidious discrimination.

This case does not, in any sense, involve any broad new legal principles that have application beyond the scope of the fact pattern in this particular case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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County Attorney
Counsel for Respondents